FEDERAL MAGISTRATES COURT OF AUSTRALIA

MINISTER FOR IMMIGRATION v KANG & ANOR *[2012] FMCA 732*

MIGRATION – Whether false document relied on to obtain student visa – whether false document relied on to obtain Trade Recognition Australia assessment – *"Bogus document"* – use of considered – whether document provided to an officer of the Department – whether inaccuracy in a Notice of Intention to Consider Cancellation is fatal to an attack on the failure of the Tribunal to exercise jurisdiction – whether the Minister is excluded from seeking relief by s.474 of the *Migration Act 1958* – whether express exclusion or necessary implication required to exclude a party by a privative clause – decisions in *Brar v Minister for Immigration & Anor* [2011] FMCA 435 and *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30 considered.

Commonwealth of Australia Constitution Act, s.75
Migration Act 1958 (Cth), ss.5, 97, 99, 100, 101, 102, 103, 107, 109, 359A, 359AA, 474
Migration Regulations 1994, reg.2.41

Brar v Minister for Immigration & Anor [2011] FMCA 435
Darling Casino Limited Plaintiff and New South Wales Casino Control Authority and Ors 191CLR 602
Minister for Immigration and Citizenship v Brar [2012] FCAFC 30
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 187 ALR 117
NAVX v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 287
Plaintiff S157/2002 v Commonwealth [2003] HCA 2; 211 CLR 476; 195 ALR 24; 77 ALJR 454
Public Service Association of South Australia Respondent and Federated Clerks' Union of Australia, South Australian Branch and Anor 173 CLR 132
R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598
Singh v Minister for Immigration & Anor [2012] FMCA 145
SBAB v Minister for Immigration & Multicultural Affairs [2002] FCAFC 161
SZIGQ v Minister for Immigration and Citizenship [2007] FCA 328
Wu Shan Liang v Minster for Immigration and Ethnic Affairs (1995) 185 CLR 259
Yusuf v Minister for Immigration and Multicultural Affairs (2001) 180 ALR 1

Applicant:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Visa holder:	JAGMEET SINGH KANG
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	MLG 1796 of 2011
Judgment of:	Turner FM
Hearing date:	17 July 2012
Date of Last Submission:	17 July 2012
Delivered at:	Melbourne
Delivered on:	24 August 2012

REPRESENTATION

Counsel for the Applicant:	Mr Horan
Solicitors for the Applicant:	Clayton Utz
Counsel for the Visa holder:	Mr Young
Solicitors for the Visa holder:	G & S Law Group

ORDERS

(1) The decision of the Migration Review Tribunal dated 24 November 2011 be removed to this Court to be quashed.

(2) A writ of mandamus issue requiring the Migration Review Tribunal to determine the matter according to law, including making findings on the matters in the Notice of Intention to Consider Cancellation; in particular:

(a) That the visa holder did not comply with ss.101(b) and 103 of the *Migration Act 1958* because, in support of his application and in order to satisfy legislative requirements for the grant of a visa, the visa holder made incorrect statements, provided incorrect information, and caused a bogus document to be given to the Department; and

(b) Including considering whether or not to exercise the discretion to cancel the visa.

FEDERAL MAGISTRATES

COURT OF AUSTRALIA

AT MELBOURNE

MLG 1796 of 2011

MINISTER FOR IMMIGRATION & CITIZENSHIP
Applicant

And

JAGMEET SINGH KANG
Visa holder

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

1. The Minister for Immigration and Citizenship seeks judicial review of the decision of the Migration Review Tribunal (the "Tribunal") dated 24 November 2011 (Court Book "CB" p.222).

2. That decision set aside the decision of a delegate of the Minister to cancel the first respondent's (the "visa holder") Subclass 880 (Skilled – Independent Overseas Student) visa.

3. The grounds in the application for judicial review are as follows:

(1) The Second Respondent (the Tribunal) exceeded its jurisdiction and/or constructively failed to exercise jurisdiction in that it identified a wrong issue or asked a wrong question.

4. *Particulars*

(a) The Tribunal erred in law by finding that:

(i) the bogus document was presented by the Visa holder to an authorised system, rather than to an officer;

(ii) the notice issued under s.107 of the Migration Act 1958 (Cth) (the s.107 notice) was deficient because it referred to the bogus document being given to an officer of the Department; and

(iii) the Tribunal therefore had no alternative but to set aside the decision to cancel the Visa holder's visa.

(b) The Tribunal should have found that:

(i) the Visa holder gave, presented or provided the bogus document to an officer; and

(ii) there was no deficiency in the s.107 notice.

(c) Alternatively, if the Visa holder gave, presented or provided the bogus document to an authorised system and not to an officer, the Tribunal should have found that the s.107 notice did not fail to provide adequate particulars of the possible non-compliance with s.103, and the Tribunal had power to consider and decide whether there was non-compliance by the Visa holder in the way described in the s.107 notice and whether the visa should be cancelled:

(i) the particulars required by s.107 to be provided relate to the bogus document which s.103 specifies is not to be given, and not to the identity of the recipient of the bogus document.

5. Section 107 of the *Migration Act* 1958 (the "Act") is as follows:

6. ***Notice of incorrect applications***

(1) If the Minister considers that the holder of a visa who has been immigration cleared (whether or not because of that visa) did not comply with section 101, 102, 103, 104 or 105 or with

subsection (2) in a response to a notice under this section, the Minister may give the holder a notice:

(a) giving particulars of the possible non-compliance; and

(b) stating that, within a period stated in the notice as mentioned in subsection (1A), the holder may give the Minister a written response to the notice that:

(i) if the holder disputes that there was non-compliance:

i. shows that there was compliance; and

ii. in case the Minister decides under section 108 that, in spite of the statement under sub-subparagraph (A), there was non-compliance—shows cause why the visa should not be cancelled; or

(ii) if the holder accepts that there was non-compliance:

j) give reasons for the non-compliance; and

k) shows cause why the visa should not be cancelled; and

(c) stating that the Minister will consider cancelling the visa:

(i) if the holder gives the Minister oral or written notice, within the period stated as mentioned in subsection (1A), that he or she will not give a written response—when that notice is given; or

(ii) if the holder gives the Minister a written response within that period—when the response is given; or

(iii) otherwise—at the end of that period; and

(d) setting out the effect of sections 108, 109, 111 and 112; and

(e) informing the holder that the holder's obligations under section 104 or 105 are not affected by the notice under this section; and

(f) requiring the holder:

(i) to tell the Minister the address at which the holder is living; and

(ii) if the holder changes that address before the Minister notifies the holder of the Minister's decision on whether there was non-compliance by the holder—to tell the Minister the changed address.

ii) (1A) The period to be stated in the notice under subsection (1) must be:

(c) in respect of the holder of a temporary visa—the period prescribed by the regulations or, if no period is prescribed, a reasonable period; or

(d) otherwise—14 days.

iii) (1B) Regulations prescribing a period for the purposes of paragraph (1A)(a) may prescribe different periods and state when a particular period is to apply, which, without limiting the generality of the power, may be to:

(a) visas of a stated class; or

(b) visa holders in stated circumstances; or

iv) (c) visa holders in a stated class of people (who may be visa holders in a particular place); or

(e) visa holders in a stated class of people (who may be visa holders in a particular place) in stated circumstances.

(1) If the visa holder responds to the notice, he or she must do so without making any incorrect statement.

7. The visa holder was granted a Skilled Overseas Student (Resident) Class DD visa on 7 November 2007. On 16 July 2010, a delegate of the Minister notified the visa holder that she was considering cancelling his Subclass 880 visa. The delegate decided to cancel the visa by decision dated 1 November 2010 (CB p.102). The visa holder was notified by letter of that date (CB p.88).

8. Sections 100 to 103 of the Act provide:

9. Section 100 ***Incorrect answers***

10. *For the purposes of this Subdivision, an answer to a question is incorrect even though the person who gave or provided the answer, or caused the answer to be given or provided, did not know that it was incorrect.*

11. Section 101 ***Visa applications to be correct***

12. *A non-citizen must fill in or complete his or her application form in such a way that:*

(a) all questions on it are answered; and

(b) no incorrect answers are given or provided.

13. Section 102 ***Passenger cards to be correct***

14. *A non-citizen must fill in his or her passenger card in such a way that:*

(b) all questions on it are answered; and

(c) no incorrect answers are given.

15. Section 103 ***Bogus documents not to be given etc***.

16. *A non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided.*

17. The decision to cancel was for reason that the visa holder had failed to comply with ss.100, 101(b) and 103 of the Act.

18. On 6 July 2007, the visa holder lodged his visa application electronically at an Onshore Department of Immigration and Citizenship ("DIAC") processing office (CB p.92.5). The application included a declaration that the information therein was complete, correct and up-to-date; plus an acknowledgment that giving false or misleading information may result in the application being refused or a visa being cancelled. The visa holder nominated his occupation as a *"pastry cook"*.

19. Upon investigation it was found that the reference that the visa holder provided from Bakers Hut Bread Supplies ("BHBS") (CB p.33) was a bogus document as defined in s.97 of the Act (CB 93.6).

20. Section 97 of the Act provides in part as follows:

21. ***Interpretation***

22. *In this Subdivision:*

23. ***bogus document****, in relation to a person, means a document that the Minister reasonably suspects is a document that:*

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

24. The delegate formed the view that the skills assessment obtained by the visa holder from Trades Recognition Australia ("TRA") was obtained because the visa holder provided false or misleading information, whether or not made knowingly, and that by definition the, TRA skills assessment is also a "*bogus document"* (CB p.93.7).

25. The applicant submits that the visa holder then presented the bogus skills assessment **to an officer of the Department** who was performing a function under the Act, of assessing the visa holder's visa application (CB p.93.9) (emphasis added).

26. The delegate then decided that the visa holder had not complied with ss.101 and 103 of the Act in that he provided the Department with incorrect information in his visa application (CB 93.10). The delegate cancelled the visa holder's visa because he contravened ss.101 and 103 of the Act (CB 223.4).

27. The visa holder applied to the Tribunal on 8 November 2010 for a review of the delegate's decision and the Tribunal (the "First Tribunal") affirmed the decision to cancel on 14 April 2011 (CB p.174).

28. On 18 May 2011 the visa holder applied to the Court for judicial review of the decision of the First Tribunal. By orders by consent on 12 August 2011 Federal Magistrate Cameron ordered that the decision of the Tribunal be set aside and that the matter be remitted to the Tribunal for reconsideration (CB p.188), as there was no evidence to support the finding by DIAC that a number of international students admitted paying the owner of BHBS for fraudulent work references (CB p.188.10).

29. Upon remittal, a differently constituted Tribunal (the "Second Tribunal") reconsidered the matter (CB p.223.5).

30. To qualify for a visa the visa holder was required to produce evidence to the Department that he had completed studies in a relevant course (here "bakery") and show evidence to TRA that he had worked in the nominated position of *"baker"* (CB p.224.6). In relation to the work experience requirement, the visa holder submitted a work reference from BHBS to TRA. On 20 April 2007 TRA issued a favourable assessment to the Department (CB p.224.8).

31. Officers from the Department commenced enquiries into BHBS and formed the view that a large scale migration fraud had been perpetrated through the use of false work references and training certificates (CB p.225.2). The visa holder did not have any evidence apart from the prepared work reference, that he had completed any work experience at BHBS (CB p.178.8).

32. The delegate decided to cancel the visa on 1 November 2010 (CB p.255.10). The visa holder applied to the First Tribunal on 8 November 2010 to review the delegate's decision.

33. Pursuant to s.359AA of the Act the First Tribunal invited the applicant to comment on information that the Department had identified, that a number of students had admitted paying BHBS for fraudulent work references, claiming they had completed unpaid work experience when in fact they had not (CB p.178.9).

34. The visa holder elected to respond to the First Tribunal's invitation at the hearing, claiming that he did in fact work at BHBS, but could not find the owner who had closed the business (CB p.179.1). The First

Tribunal stated that it was aware of a person called *"Carmine"* from Della College, who had admitted to being implicated in the manufacture of a large number of false work references for international students (CB p.179.4).

35. Regulation 2.41 of the *Migration Regulations* 1994 (the "Regulations") provides:

> 36. ***Whether to cancel visa-incorrect information or bogus document (Act, s. 109 (1) (c))***
>
> *2.41. For the purposes of paragraph 109 (1) (c) of the Act, the following circumstances are prescribed:*
>
> *(a) the correct information;*
>
> *(b) the content of the genuine document (if any);*
>
> *(c) the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;*
>
> *(d) the circumstances in which the non-compliance occurred;*
>
> *(e) the present circumstances of the visa holder;*
>
> *(f) the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act;*
>
> *(g) any other instances of non-compliance by the visa holder known to the Minister;*
>
> *(h) the time that has elapsed since the non-compliance;*
>
> *(i) any breaches of the law since the non-compliance and the seriousness of those breaches;*
>
> (j) *any contribution made by the holder to the community. (NOTE: Under s.109 of the Act, the Minister may cancel a visa if there was non-compliance by the holder of a kind set out in Subdivision C of Division 3 of Part 2 of the Act. The*

Minister is to have regard to the prescribed circumstances in considering whether to cancel the visa.)

37. The Tribunal considered the matters set out in reg.2.41 (CB p.179.6) and (CB p.182.10 – 184.4).

38. On 29 March 2011 the Tribunal wrote to the visa holder pursuant to s.359A of the Act inviting him to comment on information:

    0 *"that several former employees of Baker's Hut Bread Supplies attested that the business issued, for a payment, fraudulent work references for international students which stated that they had completed 900 hours of work experience, when in fact they had never worked at that establishment"* (CB p.180.7).

    1 That BHBS had *"been implicated in the provision of over 155 similar false work references and job offers to international students"* (CB p.180.10).

39. The visa holder did not respond directly to those allegations, but repeated claims made at the hearing (CB p.181.5).

40. The Tribunal did not accept that there was any non-compliance with s.101 of the Act by the visa holder (CB p.181.7). The Tribunal found that there was non compliance with s.103 of the Act as the visa holder *"presented a bogus document in the form of a fraudulently obtained TRA skills assessment to an officer of the Department who was performing a function under the Act"* (CB p.181.8).

41. The Tribunal had regard to information that Departmental investigators *"have identified a number of international students who admitted paying the owner of Baker's Hut Bread Supplies for fraudulent work references claiming that they had completed unpaid work experience there when in fact they had not"* (CB p.181.9).

42. The Tribunal found that the applicant did not work at BHBS *"during the period claimed in the purported work reference, which is fraudulent, and was obtained in exchange for money paid by the applicant for that purpose"* (CB p.182.3).

43. The Tribunal found that "*the purported work reference was subsequently presented to TRA by or on behalf of the applicant, and was a conditio sine qua non* (condition without which not) *of his obtaining a positive skills assessment by TRA that he then presented to the Department in support of his subclass 880 visa application"*. The First Tribunal found that the TRA skills assessment was a *"bogus document"* within the meaning of s.97(c) of the Act (CB p.182.5).

44. The Tribunal acknowledged that the s.107 notice *"inaccurately described the applicant's breach of s.103 as involving the provision of a bogus document* (sic "skills assessment" CB p.39.4) *'to an officer of the Department', whereas it was in fact presented to an authorised system, having been lodged online"* (CB 182.6). The Tribunal found that the *"minor, technical imprecision…"* did not prevent *"the applicant from knowing or answering the case against him"* (CB p.182.6).

45. The Tribunal was *"satisfied to the required degree… that the applicant did fail to comply with s.103 of the Act in the way described in the s.107 notice"* (CB p.182.7), and that it was *"a premeditated and deliberate deception that was calculated to secure him a permanent visa to which he knew full well he was not entitled"* (CB p.185.2).

46. The Tribunal affirmed the decision of the delegate to cancel the applicant's Subclass 880 (Skilled – Independent Overseas Student) visa (CB p.185.6).

47. The visa holder sought judicial review of that decision. By orders by consent on 12 August 2011, Federal Magistrate Cameron quashed the decision of the First Tribunal and ordered a reconsideration according to law (supra).

48. On 17 October 2011 the Second Tribunal wrote to the visa holder stating that on the material before it, it was unable to make a favourable decision and inviting him to attend the hearing on 10 November 2011 (CB 202). The envelope was marked *"Return to Sender"*. The visa holder did not attend the hearing (CB p.209).

49. By decision dated 24 November 2011 the Second Tribunal set aside the First Tribunal's decision to cancel the visa holders Subclass 880 visa (CB p.222).

50. When the applicant failed to attend the hearing to accept the opportunity to give evidence and explanation, *"the inevitable consequence was the rejection of his application": SZIGQ v Minister for Immigration and Citizenship* [2007] FCA 328 per Downes J at [4], citing *NAVX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 287 at [5].

51. It is clear from authorities that once the Tribunal complies with the requirements of notifying the applicant and inviting him to attend, if he fails to attend, *"the reason for non-attendance at a hearing does not matter"*: *SZIGQ* (ante) per Downes J at [5].

52. *Wu Shan Liang v Minster for Immigration and Ethnic Affairs* (1995) 185 CLR 259 per Brennan CJ, Toohey, McHugh and Gummow JJ at 272.2.

53. At [60]:

> *"The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error".*

The Applicant's Submissions

54. At the hearing by the Court on 17 July 2012 Mr Horan appeared for the applicant Minister and Mr Young for the respondent visa holder.

55. Mr Horan made the following submissions:

> *"These proceedings arise from a decision to cancel a skilled visa that was held by the visa holder, Mr Kang. And if I could give a very broad overview summary of the Minister's submissions, the visa holder was given a notice of intention to consider cancellation of his visa, which alleged that he had breached the Migration Act relevantly by providing a bogus document to an officer of the department. The tribunal set aside that cancellation decision, then following that notice, the visa was cancelled. The tribunal set aside the cancellation decision on the basis that the notice of intention to consider cancellation was incorrectly*

particularised, with the result that the tribunal was unable to consider whether the visa should be cancelled.

The Full Court of the Federal Court has since held that any defect in the particulars in the notice was not fatal to its efficacy, in other words, the Full Court held that that inaccuracy did not prevent the tribunal from considering whether the cancellation decision should be affirmed, and relying on the Full Court's decision, the Minister submits that the tribunal has made a clear jurisdictional error, relying, I should say, on a decision which, at the time, represented the law that was subsequently overturned by the Full Court, but nevertheless, that led the tribunal to fail to perform its task of reviewing the delegate's decision to cancel the visa. Now, that's the thumbnail sketch of the Minister's submissions.

I propose to deal with the submissions in three parts…" (Transcript "T" 17/07/2012 p.2)

2 The factual procedural history

3 The grounds for review relied on by the Minister

4 *Whether s.474 of the Act prevents the Minister from seeking a review of the Tribunal's decision* (T p.3).

56. It is submitted that the visa holder breached ss.101 and 103 of the Act, as, by s.103 a non-citizen must not give a bogus document to an officer, authorised system, the Minister or a Tribunal performing a function or purpose under the Act.

57. It is submitted that the TRA skill assessment was obtained because of a false or misleading statement [see s.97(c)].

58. It is submitted that the Tribunal should have, but did not go on to consider the substantive allegation of the Minister that the visa holder provided incorrect information and a bogus document to the Department (T p.5, l.40).

59. *"The case is really about the failure of the tribunal to perform the task of firstly considering whether or not that allegation* (sic "in the Notice of Intention to Consider Cancellation "NOICC" [CB p.36]") *was made out… and secondly, if it was made out, the tribunal would have had to*

consider whether or not to exercise the discretion to cancel" having considered the factors in reg.2.41 (T p.5, l.46).

60. It is submitted that the Tribunal did not consider those factual issues, because of the decision in *Brar* (post) at first instance, and that the Tribunal should have gone on and addressed the alleged contravention.

61. It is submitted that the other ground of review goes to whether or not the document was presented to an *"officer"* or to an *"authorised system"*, and that it may not be necessary for the Court to reach a decision on that ground (T p.6, l.35).

62. It is submitted that s.108 requires the Minister, or here the Tribunal, to consider the visa holder's response to NOICC and decide whether or not there was non-compliance as described therein (T p.7, l.10).

63. It is alleged that the TRA skills assessment is the bogus document that was obtained using a false work reference (T p.9, l.28). It was observed that the Second Tribunal found that the work reference from BHBS was also a bogus document within s.97(a) [CB p.39.3]. The Second Tribunal relied on the TRA being the bogus document (CB p.39.4).

64. Mr Horan referred to the Tribunal's finding that the NOICC stated that the visa holder *"presented this bogus skills assessment to an officer of the Department…"* (CB p.39.5) and the finding at CB p.234 [49] that:

> *There is no evidence to support the finding that the visa holder presented the bogus skills assessment to an officer. It was lodged on line to an authorised system and accordingly not given to "an officer".*

65. Mr Horan contends that this finding involves an error of law, as the system was not authorised (T p.11, l.25), and therefore the document was presented to an officer (T p.11, l.40) and the NOICC was therefore correct.

66. Mr Horan complains that the Tribunal found strong prima facie evidence that the visa holder provided incorrect information (on the TRA document [CB p.236.2]) without making a finding one way or the other (T p.12, l.36) and that it then stated:

> *"Had the NOICC particularised the allegations in accordance with the facts (in relation to the method of transmission of the information and the document) it appears that it would have been open to the Tribunal to find non-compliance by the visa holder in the way particularised in such a NOICC. As it is, however, the Tribunal cannot find non-compliance by the visa holder in the way described in the NOICC issued to the visa holder on 16 July 2010"* (CB p.236.3)

67. Mr Horan submits that the conclusion that "*the Tribunal cannot find non-compliance… in the way described in the NOICC"* has been *"directly overruled"* (sic) by the Full Court decision in *Brar* (post). It is alleged that the Second Tribunal's finding is a jurisdictional error being a constructive failure to exercise jurisdiction and address the substantive allegation (T p.14, l.1).

68. Mr Horan concedes that it was a finding of fact for the Second Tribunal as to whether the bogus document was given to an *"authorised system"* or to *"an officer"*.

69. Mr Horan submits that the decision in *Singh v Minister for Immigration & Anor* [2012] FMCA 145 has little or no relevance here, as it relates only to considering the likely effect of the bogus document on the decision (reg.2.41), which arises at the stage of considering the exercise of discretion.

70. Mr Horan addressed the visa holders submission that the work reference did not fall within the definition of *"bogus document"* as defined in s.97(a) as it was in fact about the visa holder. Mr Horan submits correctly (T p.16, l.40) that the particulars of non-compliance in the NOICC relate to the TRA skills assessment, not to the work reference (CB p.39.5).

71. The applicant filed written submissions about s.474 and whether the Minister is precluded from seeking a rehearing by the Second Tribunal (T p.17, l.7). The Court accepts those submissions, however, it finds that s.474 does not prohibit the Minister from seeking relief pursuant to the Act, for the reasons set out (post).

72. Mr Horan states that the applicant seeks that the matter be remitted to the Tribunal for it to complete the task of considering whether or not

the visa holder contravened s.103, and if so, whether or not the visa should be cancelled (T p.19, l.18).

Submissions for the visa holder

73. Mr Young submits that the Second Tribunal accepted that it was not open to it to find a breach of s.101 of the Act (T p.20, l.33).

74. Mr Young submits that TRA was not a relevant assessing authority for the nominated occupation and therefore there was an error in the NOICC (CB p.38.5). The Court finds that not to be a critical issue and that the visa holder would not have been misled about the grounds of the alleged breach.

75. Mr Young submits that there is a more critical failure in the NOICC being the statement at the bottom of CB p.38 that the Department had information from previous employees of BHBS about the provision of false work references. The Court finds that that defect led to the orders of FM Cameron (CB p.188) which led to the decision of the Second Tribunal.

76. Mr Young submits that the case against the visa holder, raised in the NOICC, is that the visa holder provided a false and misleading document to TRA that purports to have been, but was not, "*issued in respect of you"*.

77. In fact the principle allegation is that:

> *"In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s103"* (CB p.39.5).

78. Mr Young submits that the NOICC did not state that it was a bogus document as defined in s.97. However, the Court notes that the NOICC stated that the TRA skills assessment is a bogus document (CB p.39.5).

79. Mr Young submits that there is no evidence to support the finding that the visa holder presented the bogus skills assessment to "*an officer"*. The Court finds that the objection does not prevent the Second Tribunal considering the allegations in the NOICC (*Brar* on appeal) (post).

80. Mr Young submits that the failure by the Second Tribunal to make a finding of fact that the visa holder presented or provided the bogus document to "*an officer"* is not jurisdictional error (T p.26, l.34). For reasons given elsewhere in this decision, the Court finds that it was a failure to exercise jurisdiction (CB p.236.3).

81. Mr Young submits that the Second Tribunal did not find that the TRA skills assessment was a bogus document (T p.27, l.23) – the Court notes that to be a major ground of complaint by the Minister – *"that the Tribunal failed to perform the task of firstly considering whether or not the allegation in the NOICC was made* (sic "out")*"*. As will be seen, the allegation was that:

> *"In giving the TRA skills assessment, which is a bogus document to an officer of the department, you have failed to comply with s103"* (CB p.39.5).

82. Mr Young submits as to s.474 as follows:

> 5 That up until the decision in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476; 195 ALR 24; 77 ALJR 454 the Hickman principles applied to s.474; *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-615; (being
>
> 6 That a decision by a body is not invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority, provided that the decision is a bona fide attempt to exercise its power;
>
> 7 The decision relates to the subject matter of the legislators; and
>
> 8 The decision is reasonably capable of reference to the power given to the body)

83. so that the only decisions that could be challenged under s.474 were those that could be described as *"not bona fide"*. The Court accepts that submission.

84. Mr Young submits that is it not a necessary part of the rule of law for the Commonwealth to be able to challenge its own decisions (T p.30, l.21).

85. For reasons set out below, the Court decides that a person and/or the Minister are not to be taken to be excluded from a statutory right unless that exclusion is clearly stated or necessarily implied. The Minister is not expressly or necessarily implied to be excluded here.

86. Mr Young submits that the decision in *Plaintiff S157* (supra) interprets s.474 in a way which shows a clear intention to limit the ability to take action pursuant to it, to an individual plaintiff. The Court rejects that submissions for the reasons set out herein.

87. At p.482 Gleeson CJ stated that s.474:

> *"secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament".*

88. And at p.483:

> *"But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted."*

89. Mr Young referred to the passage at p.492 as follows:

> *"Secondly, courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment[1]. As Lord Hoffmann recently pointed out in the United Kingdom[2], for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual"[3].*

90. And at p.493:

> *"privative clauses are construed 'by reference to a presumption that the legislature does not intend to deprive the citizen of access*

[1] *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

[2] *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.

[3] See also *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

to the courts, other than to the extent ***expressly stated or necessarily to be implied****[4]"*.

(emphasis added)

91. Mr Young accepted that there are no clear statements in *Plaintiff S157* that the ability under s.474 to challenge a decision is limited to private citizens (T p.32, l.35). The Court finds that s.474 as interpreted in *Plaintiff S157* does not expressly exclude the Minister, who is also not excluded by necessary implication.

92. Mr Young referred to other passages in *Plaintiff S157* (supra) that have all been considered by the Court. The fact that they refer at times to the *"plaintiff initiating action"* does not exclude the Minister.

93. Mr Young addressed the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 187 ALR 117 which as put by Mr Young is; that a decision that involves jurisdictional error is no decision at all. In *Bhardwaj* the Minister sought judicial review of a decision of the Immigration Review Tribunal ("IRT"), when there was no equivalent of s.474 in the Act. However, it was still judicial review of a decision of a Commonwealth Tribunal where the Minister was the applicant to the Federal Court on the basis that the IRT lacked power and/or jurisdiction. The application was dismissed as was an appeal to the Full Federal Court. The Minister then appealed to the High Court which was also dismissed. However the cases were not dismissed because the Minister lacked the capacity to seek judicial review of a decision of a Commonwealth Tribunal; That objection appears not to have been raised.

94. Mr Young refers to the proposition in *Bhardwaj* that privative clauses in legislation enacted by the Commonwealth should be interpreted consistently with the Constitution (T p.33, l.20). The Court accepts that submission.

95. The Court refers to s.75 of the Constitution which is as follows:

96. ***Original jurisdiction of High Court***

97. *In all matters:*

[4] *Public Service Association (SA) v Federated Clerks' Union* [1991] HCA 33; (1991) 173 CLR 132 at 160 per Dawson and Gaudron JJ.

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

98. *the High Court shall have original jurisdiction.*

99. The Court finds no words in that section that limit recourse to the High Court for constitutional writs or an injunction to private citizens, and that deprive the Minister of that right. Section 474 should be given a consistent interpretation.

100. Mr Young submits correctly (T p.34, l.20) that the Commonwealth can legislate to prohibit Ministers seeking certain relief from the Courts. However the Court finds that has not happened here.

101. Insofar as the above arguments of Mr Young are not dealt with in more detail, they do not answer the attack on the alleged failure of the Tribunal to exercise jurisdiction, and do not require further analysis. The Court has had regard to all of the arguments of Mr Young in reaching its decision.

The Applicant's Submissions in Reply

102. Mr Horan submits that the NOICC identified the bogus documents as "*the reference from BHBS"* within the definition in s.97(a) (CB p.39.3), and "*the TRA skills assessment"* within the definition in s.97(c) (CB p.39.5). The Court accepts that submission.

103. Mr Horan refutes Mr Young's submission that, if the BHBS reference was not a "*bogus document"*, the TRA skills assessment could not be a

bogus document. All that is required for the TRA skills assessment to be a bogus document under s.97(c) is that is was obtained by a false or misleading statement, whether or not made knowingly. Mr Horan correctly identified that the false and misleading statement in the TRA skills assessment was that the applicant *"has undertaken unpaid work experience in our bakery from 11/04/06 till 20/01/07. Over this period of time he contributed to our business with more than 900 Hours"* (CB p.33.1). That statement was included in the work experience reference supplied by BHBS, which was supplied to the Department by TRA as part of its Record of Assessment (CB p.31.2). At CB p.37.8 the NOICC indicates that *"Information received indicated that you may have never worked at Bakers Hut Bread Supplies as claimed"*. Enquiries were made by the Melbourne Investigation Team with BHBS (the Court does not find the admissions by previous employees to be relevant here because of the Notation to the orders of FM Cameron [CB p.188.10]).

104. Mr Horan complains that the Tribunal did not deal with the second alleged bogus document (being the TRA skills assessment). The Court accepts that submission (CB p.236.2).

105. Mr Horan made submissions as to how the High Court interpreted s.474 in *Plaintiff S157* (supra). The Court finds s.474 to have been interpreted in [76] as follows:

> *"Once it is accepted, as it must be, that s 474 is to be construed conformably with Ch III of the Constitution, specifically, s 75, the expression "decision[s] ... made under this Act" must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act"*

106. The Court finds that the section, as interpreted, does not require reconciliation with s.75(v) of the Constitution.

107. Mr Young submitted that the *ratio decidendi* of *Plaintiff S157* is set out on p.574 of the decision at [106] as follows:

> *"Section 474 would be invalid if, on its proper construction, it attempted to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution. However, on its proper construction, it does not attempt to do so. Section 474 is valid but does not apply to the proceedings the plaintiff would initiate".*

108. The Court accepts that that could be considered to be the *ratio*; however the Court is more concerned with how s.474 was interpreted. That interpretation is set out in [76] (supra).

109. The fact that [104] of *Plaintiff S157* (supra) contains the passage below does not mean that the Minister is excluded from seeking judicial review. Indeed the Court notes the statement *"is a means of assuring to all people affected"*, which the Court decides, does not exclude the Minister.

> *"The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a* ***means of assuring to all people affected*** *that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker".*
>
> **(emphasis added)**

110. Mr Young submits at T p.42, l.24:

> *"Section 474 is valid but does not apply to the proceedings that the plaintiff would initiate, the plaintiff being, of course, Plaintiff S157, a plaintiff who was seeking the challenge a decision of the Commonwealth. The critical words are section 474 is valid but it does not apply to the proceedings that the plaintiff would initiate. In my submission that leaves perfectly open the question of whether it would, being a valid provision, that it applies to proceedings that this applicant, being the Minister, would initiate".*

111. The Court agrees, s.474 leaves *"perfectly open"* the question of whether it applies to proceedings that the Minister brings. The Court finds that the Minister is not excluded expressly or by necessary implication.

112. Mr Young continued (T p.43, l.17) *"the question* (of whether the Minister is excluded) *is left, in my submission, entirely unanswered by*

Plaintiff S157". The Court agrees; nothing was said in *Plaintiff S157* to the effect that the Minister is excluded. If the question is left *"perfectly open"*; the right should not be denied to the Minister.

113. Mr Young submits that:

> *"Section 75(v) of the Constitution is the provision which is regarded as entrenching the right of the citizen, the affected person, to test the legality of government action, there can't be a conflict with that"* (T p.44, l.11).

114. The Court agrees with that submission as far as it goes. However, the Court adds that there is nothing stated in s.75(v) or by necessary implication that excludes the Minister.

115. Mr Horan submitted that the head note to *Plaintiff S157* confirms what the *ratio* of the decision is. The Court does not rely on the content of the head note.

116. Mr Young referred to the passage in *Plaintiff S157* at p.513 at [104] (supra):

> *"The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review."*

117. Mr Young submits that the above statements are about confining judicial review to those who are subject to and affected by laws of the Commonwealth and actions of its officers, to challenge those decisions (T

p.43, l.8). Here, the Minister is affected by the actions of the Tribunal and the Court does not read the above passage as excluding the Minister.

118. Mr Young submits that s.474 should be read in its broadest sense (and exclude the Commonwealth).

119. As found above there are no clear statements that exclude the Minister and no necessary implication to that effect.

120. The submission that s.474 should be read in its broadest sense is in conflict with the decision on *Public Service Association of South Australia Respondent and Federated Clerks' Union* (post) at [160] that:

> *"Privative clauses such as s. 95 of the Act are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts"*

Section 474(1) of the Act

121. Section 474(1) of the Act provides as follows:

> 122. ***Decisions under Act are final***
>
> *(1) A privative clause decision:*
>
> *(a) is final and conclusive; and*
>
> *(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
>
> *(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.*

123. Mr Young submits that the first issue for decision is whether s.474, as interpreted in *Plaintiff S157* (supra), prohibits the Minister from seeking judicial review of a decision of the Tribunal? The Court has decided that it does not.

124. Section 474 was interpreted in *Plaintiff S157* (supra) at [76] as previously referred to.

125. It was held in *Public Service Association of South Australia Respondent and Federated Clerks' Union of Australia, South*

Australian Branch and Anor 173 CLR 132 at p.160 per Dawson and Gaudron JJ., that:

> *"Privative clauses such as s. 95 of the Act are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent* ***expressly stated or necessarily to be implied***[5]*. Thus, a clause which is expressed only in general terms may be construed so as to preserve the ordinary jurisdiction of a superior court to grant relief by way of the prerogative writs of mandamus or prohibition in the case of jurisdictional error constituted* ***by failure to exercise jurisdiction*** *or by an act in excess of jurisdiction".*
>
> **(emphasis added)**

126. It was held in *Darling Casino Limited Plaintiff and New South Wales Casino Control Authority and Ors* 191CLR 602 at p.603 per Gaudron and Gummow JJ, Brennan CJ, Dawson and Toohey JJ expressing no opinion:

> *"The operation of a State privative clause is purely a matter of its proper meaning ascertained in its legislative context. Privative clauses, whether in Commonwealth or State legislation, are construed by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied. But if the intention is clear a privative clause in a valid State enactment may preclude review for errors of any kind. If it does, the decision in question is entirely beyond review so long as it satisfied the principle stated in R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598 at 617-618".*

127. In conformity with the above decisions, the Court will not interpret the provisions in a statute in a way that take a right away from a person, including the Minister, other than to the extent that it is expressly stated or necessarily to be implied that the right has been removed. Here there is nothing stated in s.474 or *Plaintiff S157* (supra) or necessarily to be implied therefrom, that the Minister does not have the right to take action pursuant to s.474. It cannot necessarily be implied that the Minister is excluded from s.474 from seeking relief where the Tribunal fails to exercise or exceeds jurisdiction.

[5] See, e.g., *Clancy v. Butchers' Shop Employés Union* (1904), 1 C.L.R. 181, at p. 204, per O'Connor J.; *Hockey v. Yelland* (1984), 157 C.L.R. 124, at p. 130, per Gibbs C.J., and (1984) 157 C.L.R., at p. 142, per Wilson J. See also *Anisminic*, [1969] 2 A.C. at p. 170, per Lord Reid.

128. It was alleged for the visa holder before the Second Tribunal that the NOICC particularised the allegations incorrectly (CB p.236 at [53]). As a result of the decision in *Brar v Minister for Immigration & Anor* [2011] FMCA 435, the Tribunal decided that the notice was invalid.

129. In *Brar* FM Driver concluded that the notice of incorrect application given pursuant to s.107 contained a false particular in that it asserted that the applicant had provided a bogus document to an *"officer"* as defined in s.5 of the Act, when in fact it had been given to an authorised system, as defined in s.5 of the Act (see also s.99 of the Act); Therefore, the notice did not give the Minister the power to cancel the visa pursuant to s.109.

130. The decision in *Brar* (at first instance) was overturned on appeal as to the s.107 notice, in *Minister for Immigration and Citizenship v Brar* [2012] FCAFC 30. The Court held, per curiam, at [51]:

> *"The question of whether the bogus document was given, presented or provided to an officer or to an authorised system is not a jurisdictional fact. It is part of the issue of non-compliance and in the same way as the question of whether a document is a bogus document is not a jurisdictional fact (SHJB) so also is* ***the issue of the person or entity to whom the document was given not a jurisdictional fact".***
>
> 131. **(emphasis added)**

132. And at [61] – [62]:

> *"61. In our opinion, it was not Parliament's intention that all departures from the statements made in a notice under s 107 deprive the decision-maker of jurisdiction under ss 108 and 109 to making findings of non-compliance by the visa holder in the way described in the notice. The phrase "in the way described in the notice" must be read in light of the purpose of the statutory scheme which is to ensure that the visa holder has notice of the alleged non-compliance and an opportunity to dispute the allegations and to respond to them.* ***A departure which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegations of non-compliance does not deprive the decision-maker of jurisdiction under ss 108 and 109.*** *The departure in this case should be so characterised. The central issue in terms of the allegations of non-compliance was the accuracy or otherwise of the work reference letter from Dom's and adequate particulars of the*

> *allegations with respect to that issue were given in the notice under s 107. Furthermore, the notice clearly referred to the date upon which the respondent lodged his application and the address to which it was sent (see [5] above). The respondent and his advisers would not have been under any misapprehension as to the occasion upon which it was said that he had failed to comply with s 103 of the Act.* ***Finally, even if the bogus document was given, presented or provided to an authorised system, it seems clear enough that eventually it would have come to the attention of an officer of the Department.***
>
> **(emphasis added)**
>
> *62. We uphold the appellant's challenge to the Federal Magistrate's conclusion with respect to the s 107 notice issue".*

133. The Second Tribunal in the present matter decided that it was "*not satisfied that the allegation* (against the visa holder) *can be sustained because the document was submitted online rather than to an officer"* (CB p.235.10).

134. The law has changed since the decision of the Second Tribunal, and the applicant seeks a review based on the current law.

135. The Second Tribunal stated at CB p.236 [53]:

> *"The Tribunal considers that there is strong prima facie evidence that the visa holder provided incorrect information (the information on the TRA document) and a bogus document (the TRA document) to the Department. Had the NOICC particularised the allegations in accordance with the facts (in relation to the method of transmission of the information and the document) it appears that it would have been open to the Tribunal to find non-compliance by the visa holder in the way particularised in such a NOICC. As it is, however, the Tribunal cannot find non-compliance by the visa holder in the way described in the NOICC issued to the visa holder on 16 July 2010".*

136. The applicant had claimed before the Second Tribunal that the visa holder provided incorrect information and a bogus document to the respondent, as particularised in the NOICC.

137. In *SBAB v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 161 the Tribunal had failed to address one of two discrete claims that had been made by the applicant. The decision of the Tribunal was set aside and the matter remitted to the Tribunal for further consideration. The case is an illustration of the principle that

there will be an error going to jurisdiction in a case where there is a failure by an administrative Tribunal to consider claims that have been made by an applicant cf *Yusuf v Minister for Immigration and Multicultural Affairs* (2001) 180 ALR 1 at [82] – [84].

138. The instant Tribunal failed to address the claims of the applicant Minister as set out in the NOICC. There was therefore a failure to consider the claims made by the applicant which is an error of law going to jurisdiction. The decision of the Second Tribunal should therefore be set aside and the matter remitted for further consideration and findings on the matters in the NOICC.

139. The visa holder told the Second Tribunal that *"for a few months, he worked a few shifts weekly"* (CB p.226.5). The Second Tribunal therefore had evidence on which to find that the visa holder provided false information of having worked 900 hours for BHBS.

140. Having regard to the decision on appeal in *Brar* the Court finds that the Second Tribunal is required to make finding on the claims by the Minister in the NOICC and set out below.

141. The Court orders that the decision of the Second Tribunal dated 24 November 2011 be removed to this Court to be quashed.

142. The Court orders that a writ of mandamus issue requiring the Tribunal to determine the matter according to law, including making findings on the matters in the NOICC; in particular that the visa holder did not comply with ss.101(b) and 103 of the Act (CB 36.4) because, in support of his application and in order to satisfy legislative requirements for the grant of a visa, the visa holder made incorrect statements, provided incorrect information, and caused a bogus document to be given to the Department (CB 39.6); and including considering whether or not to exercise the discretion to cancel the visa.

I certify that the preceding one hundred and sixteen (116) paragraphs are a true copy of the reasons for judgment of Turner FM

Date: 24 August 2012